I BHD

v.

K A SANDURANNEHRU RATNAM & ANOR

HIGH COURT MALAYA, IPOH
BALIA YUSOF JC
[ORIGINATING MOTION NO: 25-25-2001]
5 FEBRUARY 2004

LABOUR LAW: *Industrial Court - Award - Approach of Industrial Court in making award - Whether Industrial Court should act as a criminal court - Whether Industrial Court should concern itself with technicalities of law*

LABOUR LAW: *Industrial Court - Decision - Dismissal without just cause or excuse - Approach of Industrial Court in deciding such dismissals*

ADMINISTRATIVE LAW: *Judicial remedies - Judicial review - Function of High Court when dealing with applications for judicial review - Whether High Court may act as an appeal court*

The first respondent was an employee of the applicant. He was dismissed after the applicant's domestic inquiry found him guilty of deliberately and knowingly taking out a 1.5 litre bottle of thinner without authorisation or prior approval. The matter was eventually referred to the Industrial Court ('the IC') which found *inter alia* that the first respondent was dismissed without just cause or excuse. The IC also ordered the applicant to pay the first respondent a sum of RM54,682. The applicant applied to the High Court for an order of *certiorari* to quash the decision of the IC. The applicant contended that the IC Chairman was wrong in law in treating the proceeding before the IC as a criminal proceeding and in applying a very stringent test in respect of the evidence to be adduced by the parties. The applicant further contended that the IC had erred in law by differentiating the type of thinner that was taken out by the first respondent. The applicant submitted that it mattered not what type of thinner was taken out as the charge against the first respondent concerned the taking out of 1.5 litres of thinner without authorisation.

Held:

[1] In deciding whether the dismissal was without just cause the IC had merely to consider whether on the evidence produced before it the applicant had reasonable grounds in dismissing the first respondent. The IC is not a court of law where technicalities of the law should be its prime consideration.

In determining the misconduct of the employee, the IC should not proceed as if it was exercising the functions of a criminal court. On the facts, the IC had erred and misdirected itself on the issue of the burden of proof and had committed an error of law. (pp 464 d, h & 465 b)

[2] On the facts, the IC had committed an error of law in considering the type of thinner that was taken out by the first respondent. It was irrelevant for the purpose of the charge against the first respondent what the thinner was used for. The material issue before the IC was the taking out of the thinner without authorisation. There was clear evidence to that effect as found by the IC itself. (pp 465 h & 466 a)

[3] It is not the function of the High Court to act as a court of appeal when dealing with an application for judicial review. The High Court may exercise judicial review on grounds of illegality, irrationality or procedural impropriety. In the instant case, the IC's decision was flawed by such reasons and should not be allowed to stand. (p 466 b & e)

[Allowing the application with costs.]

Case(s) referred to:
British Home Stores Ltd. v. Burchell [1978] ILR 378 ***(refd)***
Council of Civil Service Union & Ors v. Minister for Civil Service [1985] AC 374 ***(refd)***
Ferodo Ltd v. Barnes [1976] ICR 39 ***(refd)***
Harpers Trading (M) Sdn Bhd v. NUCW [1991] 1 MLJ 417 ***(refd)***
Harris Solid State (M) Sdn. Bhd v. Bruno Gentil Pereira [1996] 4 CLJ 747 HC ***(refd)***
Mak Weng Kit v. Real Exhibition Sdn Bhd [2000] 5 CLJ 253 ***(refd)***
Minister of Home Affairs v. Persatuan Aliran Kebangsaan Negara [1990] 1 CLJ 699 SC ***(refd)***
Nadarajah v. Golf Resort (M) Sdn Bhd [1992] 1 MLJ 506 ***(refd)***
R v. Deputy Industrial Inquiries Commissioner, ex p Moore [1965] 1 QB 456 ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 CLJ 786 CA ***(refd)***
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sangunai Nair & Anor [2002] 3 CLJ 314 CA ***(refd)***
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(2)

For the applicant - TM Varughese; M/s TM Varughese & Co
For the respondent - Fathima Idris; M/s Idris & Assocs

Reported by AC Simon

JUDGMENT

Balia Yusof JC:

By this application (encl. 9) the applicant, a company is seeking for an order of *certiorari* to set aside or quash the award of the industrial court made on 30 August 2001.

The first respondent was in the employment of the applicant company and at the time of his dismissal he held the post of an assistant line captain and his last drawn salary was RM1,439. On 22 September 1999 the respondent was caught by the security guard taking out 1.5 litres of thinner contained in a bottle and he was subsequently charged with deliberately and knowingly taking out 1.5 litre of thinner without authorization or prior approval before a domestic inquiry which was held on 6 October 1999. The first respondent was found guilty as a result of which his services with the applicant was terminated on 7 October 1999. A reference under s. 20(2) of the Industrial Relations Act 1967 was made *vide* Mahkamah Perusahaan No. 11 (10)/4-449/00 and by an award handed down dated 30 August 2001 the Industrial Court made an order that the applicant pay the first respondent a sum of RM54,682 after having concluded that the applicant has dismissed the first respondent not only without just cause or excuse but it is also unreasonable , not in good conscience and excessively harsh. Against this order, the applicant has filed the present application before this court for an order of certiorari to quash the said decision of the Industrial Court.

The applicant contended that the Industrial Court has committed an error of law in its approach of dealing with the matter with regard to the issue of burden of proof and the standard of proof that ought to be adopted in proceedings before the Industrial Court. Although the applicant has enumerated extensive grounds in support of its motion, I find that in a nutshell it is essentially the issue of standard of proof that forms the basis of this application. It is contended by the applicant that the learned chairman was wrong in law in treating the whole proceeding before the Industrial Court as a criminal proceeding and applying a very stringent test in respect of the evidence to be adduced by the parties before it. In my view the numerous points highlighted by the applicant in encl. 13 which sets out the grounds supporting the application points merely toward the direction of criticizing the chairman's evaluation and appreciation of the evidence adduced by the applicant in establishing the charge against the first respondent.

In support of his submission, counsel for the applicant relied on the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sangunai Nair & Anor* [2002] 3 CLJ 314 which held that in hearing a claim of unjust dismissal where the employee was dismissed on the basis of an alleged criminal offence such as theft of company property, the Industrial Court is not required to be satisfied beyond a reasonable doubt that such an offence was committed. The standard of proof applicable is the civil standard, ie, proof on a balance of probabilities which is flexible so that the degree of probability required is proportionate to the nature and gravity of the issue. The court of appeal further held that the Industrial Court should not be burdened with technicalities concerning the different standard of proof or the rule of evidence or procedure that are applied in a court of law. In holding that the applicant has failed to prove dishonest intention and further stating that the applicant has not been able to discharge their evidential burden in failing to prove every element of the charge, the Industrial Court has adopted and applied a wrong standard of proof that is required of the applicant. The function of the Industrial Court is best described by the Federal Court in the case of *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 which held:

> On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under section 20 of the Act (unless otherwise lawfully provided by the terms of the reference) is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.

Further, in *Harris Solid State (M) Sdn. Bhd v. Bruno Gentil Pereira* [1996] 4 CLJ 747 Gopal Sri Ram JCA remarked that:

> Further, section 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities. It also requires the Industrial Court to decide a case in accordance with equity and good conscience.

A similar tone was earlier echoed by Eusoff Chin J (as he then was) in *Nadarajah v. Golf Resort (M) Sdn Bhd* [1992] 1 MLJ 506:

> It is therefore to be observed that in view of the provision of section 30(5) of the Act, the Industrial Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. Technical rules such as estoppel, limitation, laches, acquiescence, etc (unless otherwise provided in the act) have no place in industrial adjudication and they should not be allowed to be invoked for defeating claims which are just and proper.

On the nature of the evidence that might be accepted by a tribunal like the Industrial Court, Diplock LJ in *R v. Deputy Industrial Inquiries Commissioner, ex p Moore* [1965] 1 QB 456 at p. 488 stated:

> These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future events the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.

In deciding whether the dismissal was without just case what the Industrial Court had to consider was merely whether on the evidence produced before it the applicant had reasonable grounds in dismissing the first respondent. The test applied in *Ferodo Ltd v. Barnes* [1976] ICR 39 states that:

> It must be remembered that in dismissing an employee including a dismissal where the reason is criminal conduct, the employer need only satisfy himself at the time of the dismissal, there were reasonable grounds for beleiving that the offence put against the employee was committed. The test is not whether the employee did it but whether the employer acted reasonably in thinking the employee did it and whether the employer acted reasonably in subsequently dismissing him.

And similarly in *British Home Stores Ltd. v. Burchell* [1978] ILR 378 is was again emphasized that:

> In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an Industrial Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time.

On the host of authorities aforementioned, it is clear that the Industrial Court is not a court of law where technicalities of the law should be its prime consideration. On the same token, in determining the misconduct of the employee, the Industrial Court should not have proceeded as if it is exercising the function of a criminal court.

On the facts and circumstances of this case, and to quote Abdul Hamid Mohamad JCA in *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair (supra)* "the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in a court of law. The Industrial Court should be allowed to conduct its proceedings as a court of arbitration, and be more flexible is arriving at its decision, so long as it gives special regard to substantial merits and decides a case in accordance with equity and good conscience". The Industrial Court has failed to observe this and on this ground alone, this court is prepared to issue an order of *certiorari* to quash the said decision. The Industrial Court has erred and misdirected itself on the issue of burden of proof and has committed an error of law.

The applicant further contends that the Industrial Court has committed an error of law in taking to account irrelevant consideration in coming to its conclusion. In this respect it was submitted that the Industrial Court has erred in differentiating the type of thinner that was taken out by the first respondent which in the applicant's contention it matters not what type of thinner was taken out as the subject matter of the charge against the first respondent was the taking out of 1.5 litres of thinner without authorisation.

As to errors of law, it has always been held that an inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely administrative function, has no jurisdiction to commit an error of law . If an inferior tribunal or other public decision taker does make such error, then he exceeds his jurisdiction. (See: *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 786). The Court of Appeal in the said case further said that:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account irrelevant considerations (what may be termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

I am of the view that the Industrial Court has committed an error of law in considering the issue as to the type of thinner that was allegedly taken out by the first respondent. This court is of the view that it is irrelevant for the purpose of the charge against the first respondent what the thinner was used for, be it for mixing paint or for the purpose of cleaning. The material issue before the

Industrial Court should be the taking out of the thinner without authorization and there is clear evidence to that effect as found by the Industrial Court itself when it held at p. 2 of the award that, "it is not in dispute that this taking out of the thinner is without the authorization or prior approval of the relevant officers of the company".

It is certainly not the function of this court to act as a court of appeal when dealing with an application for judicial review. This court may exercise judicial review on grounds of 'illegality', 'irrationality' or on a ground of procedural impropriety (see; *Mak Weng Kit v. Real Exhibition Sdn Bhd* [2000] 5 CLJ 253, *Council of Civil Service Union & Ors v. Minister for Civil Service* [1985] AC 374 and *Minister of Home Affairs v. Persatuan Aliran Kebangsaan Negara* [1990] 1 CLJ 699). In *Harpers Trading (M) Sdn Bhd v. NUCW* [1991] 1 MLJ 417, the Supreme Court held that:

> Judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled to consider whether the decision itself, on the merits of the facts, was fair and reasonable.

Upon reviewing the manner in which the decision of the Industrial Court was made, I hold that the decision was flawed by the abovementioned reasons and such a decision must not be allowed to stand. In the circumstances, this application is allowed with costs. I further order that the matter be remitted to the Industrial Court to be dealt with accordingly before a different panel.